

Pros and Cons of Alternative Dispute Resolution in Employment Disputes

Court lawsuits can be expensive, slow and time consuming, which has led employers to seek alternative methods to resolve disputes. Arbitration, jury waivers and peer review are three examples of alternative dispute resolution (“ADR”) methods.

Arbitration

Arbitration is a method for resolving disputes in which an arbitrator, instead of a judge or jury, decides the case. The parties usually mutually select the arbitrator, often by striking names from a list provided by an arbitration service or other entity. The pre-hearing discovery process is often abbreviated and hearings are held in private and are less formal than hearings held in court. The arbitrator’s decision is typically final and binding on the parties.

The Federal Arbitration Act or “FAA” strongly supports the enforcement of arbitration agreements. As a result, courts generally enforce employer-employee arbitration agreements that are not substantively and procedurally unconscionable.

Some potential advantages of arbitration include:

1. Less risk of an excessive verdict.
2. More control in selecting the decision maker.
3. Typically a faster process than litigation in court.
4. Discovery tends to be more streamlined and the parties have more control of the process.
5. The employer can often require that the hearing be conducted at a pre-specified location.
6. It may be possible to include in the arbitration agreement a waiver of the right to bring a class or collective action.
7. Defense costs are typically lower.
8. Some plaintiff’s counsel abandon claims once they learn that their client signed an arbitration agreement.
9. Hearings are held in a private as compared to public forum.

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10. Arbitration is often a more relaxed and informal process.

Depending on the circumstances, some potential downsides to arbitration include:

1. Summary judgment, which allows a court to dispose of a case without a trial, is generally not available.
2. An arbitrator may be less receptive to “hard-edged” or “technical” legal arguments than a judge.
3. Reduced discovery can sometimes be a disadvantage.
4. The parties must pay for the arbitrator’s service.
5. The employer may have to expend legal fees to enforce the arbitration agreement.
6. An adverse award, for all practical purposes, can’t be appealed.
7. The arbitrator may be inclined to “split the baby” and give both parties something.
8. The parties may not be able to join and/or bind other parties.
9. It may be harder to compel discovery or control misconduct by the other side.
10. Arbitration is not always quicker or cheaper than proceeding in court.

Jury Waivers

According to one study, roughly 40 percent of Americans believe that if a lawsuit is filed, the defendant must be guilty. Moreover, a study conducted by the U.S. Department of Justice found that plaintiffs in employment discrimination cases are almost twice as likely to win a case tried to a jury as they are to win a case tried only to a judge. A jury waiver system is intended to address issues such as these.

By signing a jury waiver, an employee agrees to forgo a jury trial and instead, have a judge resolve any disputes that arise between the employee and his or her employer. Potential advantages of using jury waivers includes:

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1. Reduced risk of an adverse verdict.
2. Eliminates the time and expense of selecting a jury.
3. Reduced likelihood of a “runaway” verdict in favor of the plaintiff.
4. Unlike arbitration, summary judgment is available.
5. A judge may be more receptive than a jury to “hard-edged” or “technical” legal arguments.

Possible disadvantages of using a jury waiver system:

1. The case remains in court and is subject to the potential expense and delay often associated with litigating claims in court.
2. Jury waivers in the employment context are a relatively new concept and enforcement is less certain than, for example, arbitration agreements.

Peer Review

Peer review systems can vary widely but a typical program allows an employee who has been disciplined/terminated to have a panel of employees and/or supervisors review the merits of the discipline/termination. Members of the panel are usually randomly selected from a pool of employees who have volunteered to serve on a panel. Some employers limit eligibility for panel service to those employees who are not currently the subject of any disciplinary action and have completed a year or more of service with the employer. A minority of the panel may consist of a randomly selected supervisor or two, who are not involved in the disciplinary action at issue.

Peer review panels may hold a brief “hearing” at which both sides can present their case -- typically without legal counsel -- or the panel may simply review relevant documents and written position statements. In some programs, the panel has the authority to reverse or uphold a disciplinary action, and its decision is binding on the employer. In other programs, the panel can only make a non-binding “finding” or recommendation regarding the termination.

The potential advantages of a peer review program include:

1. It’s quick and inexpensive.
2. The process provides a sense of fairness and “due process” that may deter the affected employee from pursuing litigation.
3. The decision of the panel may also deter the affected employee from litigating or serve as an early warning for the employer that the discipline/termination may be difficult to defend in court.

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Disadvantages of a peer review process include:

1. Limited control over the composition of the panel.
2. Depending on the panel's authority, it may require reinstatement of an undesirable employee.
3. A peer review panel may be less likely than a judge or arbitrator to understand legal arguments.

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